TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 105

THE UNITED STATES, APPELLANTS,

vs.

LEWIS MERRILL.

APPEAL FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

No. 304.

THE UNITED STATES, APPELLANTS,

vs.

LEWIS MERRILL.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims, December Term, 1867.

LEWIS MERRILL
vs.
THE UNITED STATES.

To the honorable the Judges of the Court of Claims:

The petition of Lewis Merrill, of Columbia, in the county of Lancaster, and State of Pennsylvania, respectfully represents:

That prior to and on the third day of March, A. D. 1865, he was an officer of volunteers, in commission below the rank of brigadier general, namely: he was colonel of the second regiment of Missouri volunteer cavalry, commonly called "Merrill's horse," duly commissioned, mustered and sworn, and that he continued in the military service of the United States, as colonel as aforesaid, until the 3d day of January, 1866, the said last-mentioned date being until the close of the war, within the meaning of the 4th section of the act of Congress approved March 3, 1865.

That, on the said 3d day of January, 1866, he was honorably discharged from the military service of the United States, by reason of special orders No. 2, War Department, Washington, D. C.

That, by reason of the premises and of the act of Congress aforesaid, he became and was entitled to receive from the United States three months' pay proper as a colonel of cavalry, to wit: the sum of three hundred and thirty dollars.

That he has applied to the pay department of the United States for payment of the amount so due, but without success; payment of the same, or any part thereof, having been refused.

That your petitioner is a citizen of the United States, and has
2 at all times borne true allegiance to the government thereof, and has never in any way voluntarily aided, abetted, or given encouragement to the rebellion against said government.

That your petitioner claims there is due him, by reason of the premises, the sum of three hundred and thirty dollars from the government of the United States, and for that amount he respectfully prays judgment.

CHIPMAN & HOSMER, *Attorneys for Claimant.*

STATE OF NEBRASKA, *County of Douglas, ss:*

Lewis Merrill, of said county, being duly sworn, says that no assignment or transfer of the claim mentioned in the above and foregoing petition, or any part thereof, or any interest therein, has ever been made to any person whomsoever; that he, the said claimant, is justly entitled to the amount in said petition claimed from the United States after allowing all just credits and offsets; and that he verily believes the facts as stated in said petition are true.

LEWIS MERRILL,
Late Colonel Reg't Merrill Horse, Mo. Vol. Cav.

Sworn and subscribed before me, this 30th day of December, 1867.

GEORGE ARMSTRONG,
Clerk of the District Court, Douglas County, Nebraska.

3 In the United States Court of Claims.

THE UNITED STATES
vs.
LEWIS MERRILL. } No. 3,047.

And the said defendant by John B. Kerr, its deputy solicitor, comes and makes answer to the petition of claimant on file herein; and not confessing the same or any part thereof, does hereby most expressly deny each and every the allegations therein contained and call for strict proof of the same.

And as to so much of said petition as sets forth and avers the United States is indebted to said claimant in the sum of three hundred and thirty dollars, the defendant says that it is not indebted to said claimant, in said sum of money or any part thereof.

(Signed) JOHN B. KERR,
Deputy Solicitor for the United States.

4 United States Court of Claims.

LEWIS MERRILL
vs.
THE UNITED STATES. } No. 3,047.

And now to wit, 27th April, A. D. 1868, the court upon due consideration of the premises, do find in favor of the claimants, and do order, adjudge and decree, that the said Lewis Merrill do have and recover of and from the United States the sum of three hundred and thirty dollars, ($330.)

By the Court.

5 United States Court of Claims.

LEWIS MERRILL
vs.
THE UNITED STATES. } No. 3,047.

The United States by E. P. Norton its solicitor hereby makes application to the hon. Court of Claims for an appeal of the case of Lewis Merrill *vs.* The United States, to the Supreme Court of the United States. The judgment in said case affecting a class of cases.

(Signed) E. P. NORTON,
Solicitor for the United States.

Filed June 8, A. D. 1868, in the clerk's office.

6 United States Court of Claims.

LEWIS MERRILL
vs.
THE UNITED STATES. } No. 3,047.

At a Court of Claims held at the Capitol, in the City of Washington, on Monday the 15th day of June, A. D. 1868.

Ordered, that the petition for an appeal filed in this case by the solicitor for the United States, be allowed.

By the Court.

7 MERRILL
v.
UNITED STATES.

Opinion of the Court giving facts and point of law.

Per curiam:

The claimant, in August, 1861, was an officer in the regular army of the United States. On the 23d day of that month he was commissioned as colonel of the 2d regiment of Missouri cavalry, known as the "Merrill horse," a volunteer organization. He remained in such service until the 14th of December, 1865, when he was honorably discharged the volunteer service, and resumed his duty and rank in the regular army.

This suit is brought to recover the three months' pay given to volunteer officers honorably discharged by the 4th section act 3d March, 1865, (13 Stat., p. 497,) which is as follows:

"All officers of volunteers now in commission below the rank of brigadier general, who shall continue in the military service until the close of the war, shall be entitled to receive upon being mustered out of said service three months' pay proper."

Some doubts having arisen as to the meaning of this provision, Congress, on the 13th July, 1866, passed an act directing that it shall "be so construed as to entitle to the three months' pay proper, provided for therein, all officers of volunteers below the rank of brigadier general, who were in service on the 3d of March, 1865, and whose resignations were presented and accepted, or who were mustered out at their own request, or otherwise honorably discharged from the service after the 9th day of April, 1865."—14 Stat. L., p. 94.

We confess that there is a great force in the objection of the learned deputy solicitor, that this provision was intended specially for those persons who left civil occupations to engage in the military service, and to afford them the means of living until they should be able to return to some permanent employment. There are a number of such cases. It is important that the law shall be settled. And as the United States have the right of appeal in these cases, and the claimant, by reason of the limited amount in controversy, has not, we rule the case in favor of the claimant, that it may be authoritatively decided by the Supreme Court of the United States.

Judgment for claimant for $330.

United States Court of Claims.

LEWIS MERRILL
vs.
THE UNITED STATES. } No. 3,047.

CLERK'S OFFICE.

I, John Randolph, ass't clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, and the final judgment of the court thereon; of the application of the solicitor of the United States for the allowance of an appeal, filed in the clerk's office June 8, 1858, and of the order of the court allowing the same, of the opinion of the court setting forth the facts, and conclusions of law on which the court finds its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 24th day of November, A. D. 1868.

[SEAL.] JOHN RANDOLPH,
Ass't Cl'k C't of Claims.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
vs.
LEWIS MERRILL. } No.

BRIEF FOR THE UNITED STATES.

E. R. HOAR,
Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
vs.
LEWIS MERRILL. } No.

Brief for the United States.

The claimant, in August, 1861, was an officer in the regular army of the United States. On the 23d of that month, he was commissioned as colonel of the 2d regiment of Missouri cavalry, a volunteer organization. He remained in this regiment until December 14, 1865, when he was honorably discharged therefrom, and resumed his duty and rank in the regular army.

Upon this discharge he claimed three months' (in advance) pay proper, which was not paid to him; and for that sum, three hundred and thirty dollars, he brought this suit in the Court of Claims, where judgment being in favor of the petitioner, the United States now brings the case by appeal to this court.

The provisions of law affecting this claim are the 4th section of the act of March 3, 1865, (13, 497,) and the act of July 13, 1866, (14, 94;) the former being as follows:

"All officers of volunteers now in commission below the rank of brigadier general, who shall continue in the *military service* until the close of the war, shall be entitled to receive upon being mustered out of *said service* three months' pay proper."

This provision is, by the latter act, required to "be so

construed, as to entitle to the three months' pay proper, provided for therein, all officers of volunteers below the rank of brigadier general who were *in service* on the 3d day of March, 1865, and whose resignations were presented and accepted, or who were mustered out at their own request, or otherwise honorably discharged from *the service*, after the 9th day of April, 1865."

The judgment of the court below rested upon an erroneous construction of *these* provisions of law.

The word "service," used twice in this act of 1866, must be referred, for its precise meaning, back to the earlier act, where the same idea is fully expressed by the words "military service." It is officers in "*the military service*" who are to be benefited by the act of 1865; and when the act of 1866 uses the phrase "in service," it really intends *the military service.* So also, the words in the latter act, "discharged from the service," have the same reference as those in the former act, "mustered out of said service;" the word "said" referring to the previous expression already noticed, "military service."

Now, out of the *military service* of the United States the case does not show the claimant to have been mustered or discharged. The finding is that he was "discharged the volunteer service and resumed his duty and rank in the regular army." His ceasing to be a colonel in a volunteer organization did not put an end to his connection with the military service of the United States any more than if he had been mustered out of that organization for promotion to the rank of brigadier general in either branch, volunteer or regular.

Suppose the latter. This would have taken him out of the volunteer service as effectually as did the discharge which he received; but would such a mustering out have entitled him to the three months' pay proper provided by the statutes now under consideration? Clearly not.

This construction carries out the obvious intent of Congress in passing this act of 1865. Its object was to induce men *to remain in the military service.* There was no need to offer inducements to officers who intended

to continue in that service to remain *in the higher ranks* of such service, to continue to be colonels rather than to become captains or lieutenants.

Nor can Congress have intended to give three months' pay proper additional to any officer who, during the same three months, was actually drawing pay and allowances as an officer of the army. The object was merely to provide for that want of income which would befall the discharged volunteer officer before he could resume employment in civil life.

The provision made was for officers of volunteers leaving the military service, and for no other officers.

Accordingly the judgment of the court below should be reversed, and the case remanded, that the petition may be dismissed.

E. R. HOAR,
Attorney General of the United States.

AUGUST 26, 1869.

Supreme Court of the United States.

APPEAL FROM THE COURT OF CLAIMS.

THE UNITED STATES, appellants,
vs.
LEWIS MERRILL.
No. 304.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The defendant brought suit in the Court of Claims for three months' pay, as colonel of the 2d regiment Missouri cavalry volunteers, which Congress voted to all officers of volunteers in commission below the rank of brigadier general at the date of the passage of the act March 3, 1865, (13 Stats., 497,) and as re-enacted July 13, 1866, (14 Stats., 94.)

It was shown on trial that the defendant, in August, 1861, was an officer of the regular army of the United States; that on the 23d of that month he was commissioned as colonel of volunteers, and remained in such service until December 14, 1865, when he was honorably discharged the volunteer service, and resumed his duty and rank in the regular army.

Question:

Is an officer of the volunteer forces, who held a commission also in the regular army, but who, in other respects, supplies

all the conditions of the law, entitled to the three months' pay?

The statute is not vague.

"All officers of volunteers now in commission below the rank of brigadier general, who shall continue in the military service until the close of the war, shall be entitled to receive, upon being mustered out of said service, three months' pay proper." (Act March 3, 1865.) Subsequently, July 13, 1866, Congress construed the act, but made no substantial change except to limit the date of discharge to a time "after the 9th day of April, 1865."

As we read the law, the requisites to recovery are:

1. Commission in volunteer service below rank of brigadier general on March 3, 1865.

2. Continuance in the volunteer military service until the close of the war, or until after the 9th day of April, 1865.

3. Honorable muster out or discharge from such service.

It will not be questioned that all these conditions meet in the defendant's case. But it is urged against his right to recover, that he was at the same time an officer of the regular army. Suppose he was; does this change the fact that he was also an officer of volunteers? The law makes no exception, and can you interpolate one? Would it not have been competent for Congress to give this pay to an officer of volunteers, if he had at the same time held a civil office? Then why not if he held a military office?

The position he held in the regular army did not change his relation as a volunteer while commissioned and serving as such. He was triable by court-martial as colonel of volunteers; he performed the duties and was charged with the responsibilities of that office; he drew his pay there and not elsewhere; and was treated by the department and his fellows as colonel of volunteers; his death, as colonel, would have given his survivor the right to a pension as colonel, and had he survived the loss of a limb as such officer, he would to-day be drawing the pension of colonel, and not the pension belonging to his regular rank.

But the law must be its own interpreter, and the reasons

urged against recovery, unless deducible from the law, must not govern. We have no right to suggest probable motives for passing the law, when they are not needed to construe it. If it is plain and unambiguous, there is no room for construction. The suggestion found in the opinion of the court below, and repeated by the Attorney General, is mere speculation, and may be far from the real intention of Congress in passing the act.

There were thousands of volunteer officers paid who were not also regular officers. If the twenty (for there were not more) volunteer officers who held nominal rank in the regular army were not intended to be benefitted by the law, Congress would have said, "All officers of volunteers who are not also officers in the regular army," &c. But the language used is general—universal. There is no exception.

Courts cannot legislate; but to make the exception urged is an act of legistion.

Courts cannot explore for probable reasons when the law is plain; but to adopt the suggestion of counsel would open a field endless in extent, and which could throw no light upon the act.

The law must be held to mean either what it says, or what it does not say.

The first is easily determined; the second mere conjecture. All can understand the meaning of language expressed, but no two persons can agree as to the meaning of language not expressed.

Our view rests upon the meaning expressed; the appellant's upon the meaning not expressed.

In such case there should be no difficulty.

The Attorney General suggests further, that the case does not show the defendant was mustered out of the military service, the finding being that he was discharged the volunteer service, and resumed his duty and rank in the regular army.

It is not pretended that the defendant was mustered out of the regular army, nor is this necessary. The "military service" out of which the defendant must have been mustered, or from which discharged, we think, was the *volunteer military*

service, and herein lies the error of the point suggested by the Attorney General.

The "military service" spoken of in the first act, and the "service" spoken of in the second, doubtless relate to the same service; but that can be none other than the service performed by the persons described in the act as volunteer officers. The act was passed to bestow a gratuity upon officers of volunteers, and this is the controlling idea in the law. The terms "military service" and "service" are subordinate, and depend upon the terms "volunteer officers" for their signification. When the defendant ceased to be an officer of volunteers in the manner prescribed by the law, he ceased to be in the military service as such volunteer, and that is all the act requires. Whether he found himself immediately transferred to another branch of the service, military or civil, by virtue of other relations with the Government, is not to the purpose.

The defendant resumed duty as a regular officer by a commission totally distinct from his volunteer commission. The law found him a volunteer officer, and did not except him out of its generous provisions. We think the law should stand as enacted, and not be interpreted in a spirit at variance with its provisions.

CHIPMAN & HOSMER,
Attorneys for Appellee.

See Army Regulations (1863)
Sec. 1378